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In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 679

DR. JONATHAN O. COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL AND DR. MILTON GREENBLATT, COMMISSIONER, DEPARTMENT OF MENTAL HEALTH, COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

LUCRETIA PETEROS RICHARDSON,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

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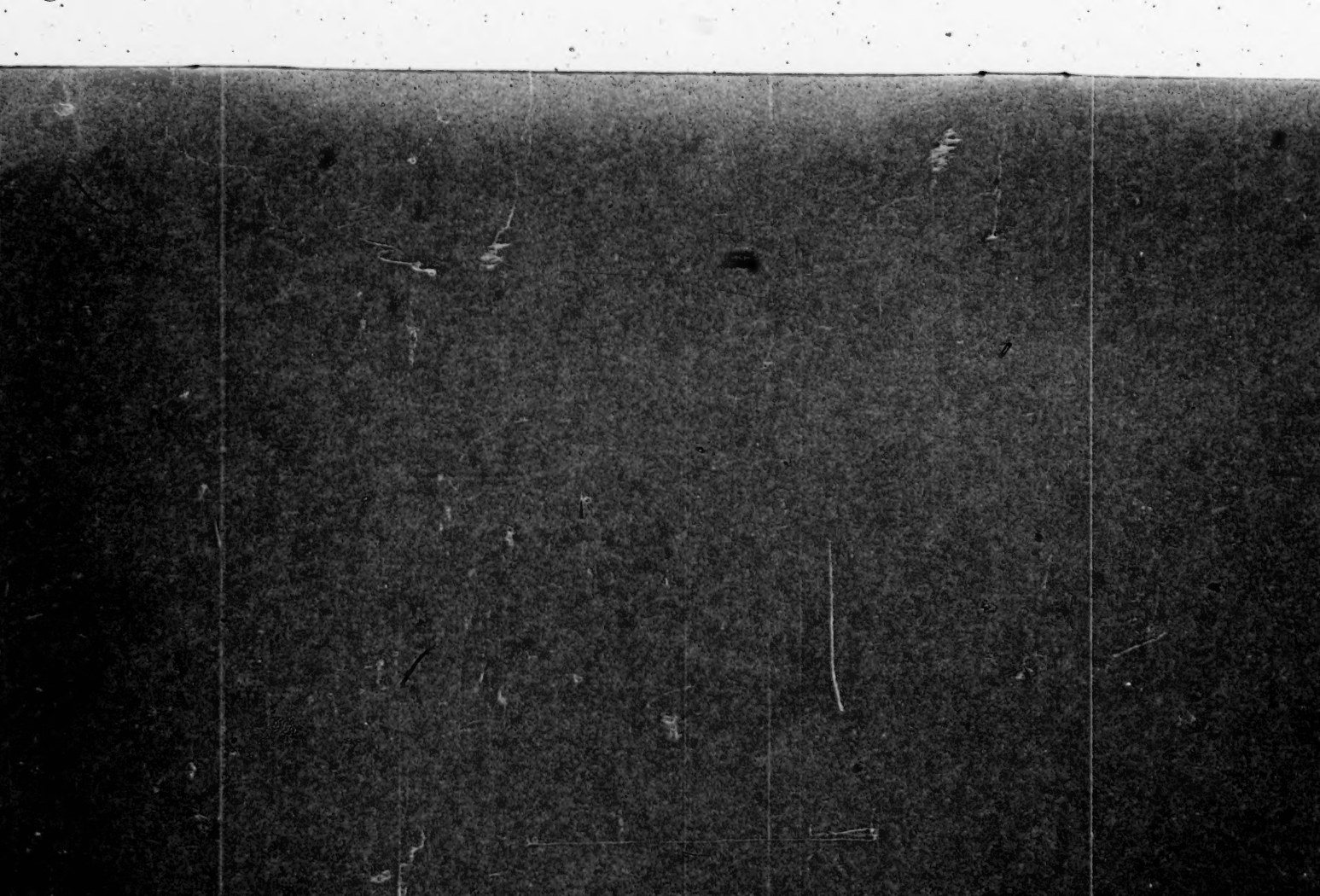


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In the Supreme Court of the United States.

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DR. JONATHAN O. COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL, AND DR. MILTON GREENBLATT, COMMISSIONER, DEPARTMENT OF MENTAL HEALTH, COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

LUCRETIA PETEROS RICHARDSON,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

The appellants, pursuant to United States Supreme Court Rule 15, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment and injunction in question and urge that the Court exercise such jurisdiction in this case.

Opinion Below.

The opinion of the District Court is unreported.

Copies of the opinion and of the judgment and injunction are annexed hereto (see Appendix).

Jurisdiction.

The appeal herein is from a final judgment and injunction made and entered by the United States District Court for the District of Massachusetts, especially constituted under 28 U.S.C. §§ 2281 and 2284 upon the plaintiff's application for a permanent injunction to restrain the enforcement, operation, or execution of a statute of the Commonwealth of Massachusetts, to wit, Massachusetts General Laws, chapter 264, section 14, for repugnance to the First Amendment and Fourteenth Amendment to the Constitution of the United States.

The final judgment and injunction appealed from was made and entered on June 26, 1969. Notice of appeal was filed in the United States District Court for the District of Massachusetts on July 30, 1969.

The Supreme Court of the United States has jurisdiction to review, by way of direct appeal, the judgment and decree complained of pursuant to the provisions of 28 U.S.C. §§ 1253 and 2101 (b).

The statute of the Commonwealth of Massachusetts that is involved is Massachusetts General Laws, chapter 264, section 14, which provides:

> "Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and

subscribe to, under the pains and penalty of perjury, the following oath or affirmation:—

"'I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.'

"Such oath or affirmation shall be filed by the subscriber, if he shall be employed by the state, with the secretary of the commonwealth, if an employee of a county, with the county commissioners, and if an employee of a city or town, with the city clerk or the town clerk, as the case may be.

"The oath or affirmation prescribed by this section shall not be required of any person who is employed by the commonwealth or a political subdivision thereof as a physician or nurse in a hospital or other health care institution and is a citizen of a foreign country." (As added by St. 1949, c. 619 and amended by St. 1967, c. 89.)

The District Court held this statute unconstitutional under the First Amendment of the Constitution of the United States.

Question Presented.

The ultimate question presented is: Did the District Court err in holding unconstitutional, and enjoining the operation of, the Massachusetts public employee loyalty oath, Massachusetts General Laws, Chapter 264, Section 14?

The ultimate question involves, among others, the following subsidiary questions:

(1) Does the oath required of all state employees by Massachusetts General Laws, c. 264, § 14, violate the First Amendment to the United States Constitution?

(2) Does the oath required of all state employees by Massachusetts General Laws, c. 164, § 14, violate the Fourteenth Amendment to the United States Constitution?

(3) Did the District Court err in deciding the case on the merits rather than abstaining, pending interpretation of the oath by the Supreme Judicial Court of Massachusetts, or by failing to interpret the oath in such a way as to cure possible constitutional infirmities, or in holding the entire statute unconstitutional rather than severing any unconstitutional portion of the oath?

Statement of the Case.

The defendant Dr. Milton Greenblatt is Commissioner of Mental Health for the Commonwealth of Massachusetts. The defendant Dr. Jonathan O. Cole is Superintendent of Boston State Hospital. Plaintiff, Lucretia Peteros Richardson, was employed as a research sociologist at Boston State Hospital, commencing work on September 30, 1968.

On November 15, 1968, plaintiff was requested to subscribe to the oath required of all state employees by Massachusetts General Laws, c. 264, § 14:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."

Plaintiff refused to affirm the oath.

On November 25, 1968, plaintiff again refused to affirm the oath. Her employment at Boston State Hospital was thereupon terminated. Plaintiff was paid for her services up to November 25, 1968.

Plaintiff brought an action in the United States District Court for the District of Massachusetts by complaint filed March 21, 1969, alleging the unconstitutionality of Massachusetts General Laws, c. 264, § 14, and praying for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284. On May 16, 1969, counsel for both plaintiff and defendants submitted a stipulation of facts as required by the pretrial order of the District Court on May 7, 1969.

On June 26, 1969, the District Court, upon consideration of the complaint, the answer of the defendants, the stipulation of facts, and the briefs and arguments of counsel, held unconstitutional and enjoined the operation of Massachusetts General Laws, c. 264, § 14. In its judgment and injunction of June 26, 1969, the District Court ordered, adjudged and decreed:

> "a) that section 14 of chapter 264 of the General Laws of Massachusetts violates the First Amendment of the Constitution of the United States and is therefore invalid; and
>
> "b) that the defendants be, and they are hereby, permanently enjoined from prohibiting the plaintiff from discharging her duties at the Boston State Hospital insofar as such prohibition is based upon her refusal to take the oath required by said section 14 of chapter 264 of the General Laws of Massachusetts."

Notice of appeal on behalf of the defendants was filed with the United States District Court for the District of Massachusetts on July 30, 1969.

The Question Presented is Substantial.

The United States District Court for the District of Massachusetts has held unconstitutional a statute designed by the Commonwealth of Massachusetts as a reasonable measure to protect the public service by establishing an employment qualification of loyalty to the state and to the United States.

Massachusetts General Laws, c. 264, § 14, requires of all state employees the following oath:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."

This oath is carefully designed as the least restrictive method of securing for the state the bare minimum of loyalty required for the very existence of state government—support of our constitutional framework of government and opposition to the illegal overthrow of democratic institutions. The oath does no more than protect the state's most fundamental interest. It is not unconstitutional for a state to protect this interest with an oath and no case has so held. Even in *Baggett* v. *Bullitt*, 377 U.S. 360, while holding the substance of an oath unconstitutional, the United States Supreme Court asserted:

> "As in *Cramp* v. *Board of Public Instruction, supra*, we do not question the power of the State to take proper measures safeguarding the public service from disloyal conduct." *Baggett, supra*, at 379-380.

We respectfully submit that Massachusetts General Laws, c. 264, § 14, is a proper measure safeguarding the public service from disloyalty and does not contravene the Constitution of the United States. In holding this statute unconstitutional, the District Court has erred by invalidating an oath which is neither so broad as to impermissibly infringe upon First Amendment freedoms, nor so vague as to violate the requirements of due process of the Fourteenth Amendment of the United States Constitution.

Furthermore, to the extent that the District Court based its decision on a characterization of the words of the oath, it is respectfully submitted that the District Court erred in two further respects. First, if the District Court was confused concerning the official position of the Commonwealth of Massachusetts as to the most reasonable interpretation of the Massachusetts oath, it is submitted that the District Court acted improperly in not abstaining from deciding the case on the merits, in order to give the Supreme Judicial Court of Massachusetts an opportunity to give the oath a definitive characterization. Second, if the District Court considered the second portion of the Massachusetts oath susceptible of one interpretation consistent with the Federal Constitution and one which was not, the District Court acted improperly in not saving the oath by accepting the interpretation which it considered to be constitutionally permissible.

Moreover, if one portion of the oath is constitutional while another is unconstitutional, the District Court erred in holding the entire statute unconstitutional, rather than severing any unconstitutional portion.

The Oath Does Not Abridge the Plaintiff's First Amendment Rights.

The District Court held the oath violative of the First Amendment. Nowhere in its opinion, however, does the

Court make clear the basis for such a conclusion, as the oath affects not at all the plaintiff's freedom of speech.

The first portion of the Massachusetts oath, requiring a promise to uphold and defend the United States and Massachusetts constitutions, is like that oath required by the United States Constitution itself of all federal and state legislators and all federal and state executive and judicial officers:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . ." (U.S. Constitution, Article VI, Clause 3.)

The terms "uphold and defend" in the Massachusetts oath are indistinguishable from the word "support" in the United States Constitution. Webster lists both "uphold" and "defend" as synonyms for "support." (Webster's New International Dictionary, 3d Edition.) Each of the three words imports a duty to maintain the existence of, or to prevent the downfall of, that which is the object of the undertaken obligation.

Furthermore, to hold the first portion of the Massachusetts oath violative of the First Amendment is to ignore the Supreme Court's per curiam decision affirming *Hosack* v. *Smiley*, 276 F. Supp. 876 (D.C. Colo. 1967), aff'd 390 U.S. 744. The University of Colorado required that teachers and employees take an oath to support the Constitution and laws of the United States and the Constitution and laws of the State of Colorado as a condition of their employment. The United States District Court held, *inter alia*, that the oath did not "have any tendency to curtail freedom of ex-

pression as guaranteed by the First Amendment (and incorporated by the Fourteenth)." *Hosack,* 276 F. Supp. 876, 879. The Court added:

> "Recognition of and respect for law in no way prevents the right to dissent and question repugnant laws. Nor does it limit the right to seek through lawful means the repeal or amendment of state or federal laws with which the oath taker is in disagreement. Support for the constitutions and laws of the nation and state does not call for blind subservience." *Hosack, supra,* at 879.

The decision by the District Court of Massachusetts that the Massachusetts oath violates the First Amendment also contravenes the Supreme Court's affirmance of *Knight* v. *Board of Regents of the University of the State of New York,* 269 F. Supp. 339 (S.D. N.Y. 1967), aff'd 390 U.S. 36 (1968). The District Court held that the oath there in question, one part of which required the subscribing teacher to affirm that he would support the constitutions of the United States and the State of New York, imposed "no restrictions upon political or philosophical expressions by teachers in the State of New York." *Knight,* 269 F. Supp. 339, 341. The Court added:

> "A state does not interfere with its teachers by requiring them to support the governmental systems which shelter and nourish the institutions in which they teach . . ." *Knight, supra,* 341, 342.

Similarly, it is respectfully submitted that the Massachusetts oath, by requiring that the subscriber affirm that he will uphold and defend the constitutions of the United States and Massachusetts, does not violate the cherished freedoms of the First Amendment.

Moreover, it is submitted that the second portion of the Massachusetts oath requiring that the subscriber will oppose the overthrow of the government of the United States or Massachusetts by force, violence or by any illegal or unconstitutional method does not violate the First Amendment and that the District Court erred in so holding.

Such an oath to "oppose the overthrow of the government" requires of a subscriber even less than an oath to support the federal and state constitutions, for to support the federal and state constitutions, the mainstays of federal and state government, is, at the same time, to oppose the overthrow of the government. By this analysis, the second portion of the Massachusetts oath is designed to but clarify an aspect of the obligation imposed by the first portion of the oath. It is submitted that the second portion of the oath, by the most reasonable interpretation, requires no more of the oath-taker than not favoring the overthrow of the government.*

Even if the Massachusetts oath, or the oath imposed by Article VI, Clause 3 of the United States Constitution, or the oaths in *Hosack* and *Knight*, both *supra*, could possibly be read to impose an affirmative obligation to speak or act, such an obligation would of course be read as applying only in the most limited and extreme of circumstances—when the downfall of the Constitution or the destruction of the government is imminent, when there is a clear and present danger of the foundations and institutions of democracy being overthrown. If such were a permitted interpretation of the oath—that is, seeing the oath as imposing an affirmative obligation to speak or act—it is submitted that

*To the extent that the District Court's characterization of the oath bears on both First Amendment questions and Fourteenth Amendment due process questions, this issue will be treated in the final section of the jurisdictional statement.

a state's interest in its own existence is sufficient to justify exacting such a promise to speak or act from its employees, at least when the affirmative obligation operates only when the very existence of the state is threatened.

The plaintiff has made no allegation that *any* portion of the Massachusetts oath violates her First Amendment freedom of association. Such allegation would be clearly unfounded.

First, the oath is not on its face or by any reasonable interpretation concerned with one's associates. The oath is quite unlike those negative oaths or non-Communist oaths struck down by the Supreme Court as restricting one's freedom of association. See, *e.g.*, *Baggett* v. *Bullitt*, 377 U.S. 360; *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589; *Elfbrandt* v. *Russell*, 384 U.S. 11; and *Cramp* v. *Board of Public Instruction*, 368 U.S. 278.

Secondly, the reasoning of the Court in *Hosack* and *Knight*, where oaths requiring a recognition and respect for law were upheld, is helpful also in analyzing this freedom of association issue. In the language of *Hosack*, recognition of and respect for law in no way inhibits the right to associate as one wishes and support for the institutions and laws of the nation and state does not call for blind subservience.

In conclusion, the decision of the United States District Court for the District of Massachusetts that Massachusetts General Laws, c. 264, § 14, is unconstitutional under the First Amendment raises a substantial question as to constitutionality because that decision runs both counter to precedent, in disregard of the *Hosack* and *Knight* decisions, and counter to reason.

The Oath Does Not Abridge the Plaintiff's Fourteenth Amendment Rights.

Even though the United States District Court for the District of Massachusetts adjudged the Massachusetts oath unconstitutional under the First Amendment, the opinion of the Court seems to focus on Fourteenth Amendment due process considerations. It is respectfully submitted that the Massachusetts oath is not so vague as to deny the subscriber due process and that the District Court was in error to the extent such an analysis influenced its decision.*

The District Court failed to take proper cognizance of the most recent cases in which the United States Supreme Court has rejected a challenge to a loyalty oath on vagueness grounds. *Hosack* v. *Smiley*, 276 F. Supp. 876 (D. Colo., 1967), aff'd 390 U.S. 744 and *Knight* v. *Board of Regents of the University of the State of New York*, 269 F. Supp. 339 (S.D. N.Y. 1967), aff'd 390 U.S. 36.

In *Hosack, supra*, state university faculty and employees sought injunctive relief against the requirement that they take an oath to support the state and federal constitutions and laws as a condition of their employment. The District Court held, and the Supreme Court affirmed, *inter alia*, that such an oath was not so vague and indefinite as to violate the Fourteenth Amendment. In so deciding the Court used the test for determining whether a statute is unconstitutionally vague enunciated by the Supreme Court in *Connally* v. *General Construction Co.*, 269 U.S. 385, at 391, and

*To the extent that the District Court's characterization of the oath bears on both First Amendment questions and Fourteenth Amendment due process questions, this issue will be treated in the final section of the jurisdictional statement.

also in *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, at 287:

> ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Using this test, the *Hosack* Court held, at page 878, regarding the oath to support the federal and state constitutions:

> "The oath in question is plain, straightforward and unequivocal. A person taking it is not left in doubt as to his undertaking. The obligation assumed is one of simple recognition that ours is a government of laws and not of men. Such an oath was upheld in Knight v. Regents of the University of the State of New York . . ."

The oath in the *Knight* case provided:

> "I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position . . . to which I am now assigned."

This language, the *Knight* Court held at 341, was "simple and clear in its import" and not violative of due process. Regarding the first portion of the oath, to support constitutional governments, the Court declared:

> "The statutory language of support of the constitutional governments can be substantially equated to that

allegiance which, by the common law, every citizen was understood to owe his sovereign." *Knight*, *supra*, at 341.

The first portion of the Massachusetts oath does no more than, and is not substantially different from, the oath in *Hosack* or the first part of the oath in *Knight*. The language is plain, straightforward and unequivocal in requiring simple recognition as to the nature of our government and in requiring that minimum allegiance owed a sovereign by each citizen.

The second portion of the Massachusetts oath, requiring the subscriber to oppose the overthrow of the governments of the United States and Massachusetts, also withstands attack on vagueness grounds.

As discussed above when the First Amendment challenge to this portion of the oath was considered, the obligation to oppose the overthrow of the government is but one aspect of the greater obligation undertaken to "support" or "uphold and defend" the constitutional foundations of federal and state government. The second portion of the Massachusetts oath was designed, not to expand upon the first undertaking, but to clarify one aspect of it.

Furthermore, the language meets the test of vagueness set forth in the *Cramp* and *Connally* cases. Just as the first portion of the oath required that the subscriber maintain a state of mind to uphold and defend the Constitution, the second portion requires a state of mind in opposition to the overthrow of the government. As discussed above, it is submitted that this portion of the oath, under the most reasonable interpretation, requires no more than not favoring the overthrow of the government. Such opposition is but another aspect of the allegiance which every citizen owes his sovereign. Here, of course, the Legislature has chosen

to place this obligation on a smaller group of persons than the ordinary populace—those persons employed in the service of the public.

Even if the Court interprets "to oppose the overthrow of the government" as requiring some form of affirmative action on the part of the subscriber, it is respectfully submitted that men of common intelligence must neither guess at the meaning of those words nor differ as to the application of the obligation undertaken.

Decisions of the Supreme Court are significant in their failure to find fault with portions of oaths which impose a duty similar to that of opposition to the overthrow of the government. In *Cramp, supra*, the Court failed to find that language to the effect that the subscriber must not believe in the overthrow of the government was unconstitutionally vague. The *Elfbrandt* decision does not criticize the Arizona oath insofar as it reached those who knowingly or willfully overthrew or aided in the overthrow of the government or advocated overthrow by force or violence. In *American Communications Association* v. *Douds*, 339 U.S. 382, an affidavit required of union officers provided, in part, that the affiant did "not . . . support any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." This portion of the affidavit was expressly upheld as constitutional. In finding the entire oath consistent with the Constitution, the Court specifically addressed itself to the argument that these words were impermissibly vague and dismissed the contention for want of merit. *Douds, supra*, at 412.

Further, even when the Court has invalidated oaths or affidavits of non-membership in subversive organizations of the Communist Party, the Court has clearly indicated that a state may require of prospective employees an affirmation

that they do not embrace the aims of an organization which has as one of its purposes the forceful or unlawful overthrow of the government. See *Elfbrandt v. Russell, supra.* It is submitted that if an oath which provides that the subscriber does not embrace the illegal aims of an organization bent on overthrowing the government does not suffer the vice of vagueness, it follows that an oath requiring opposition to those same kinds of acts is not invalid. If it is constitutional to require an affirmance that certain aims not be pursued, it is not substantially different to require opposition to those same acts.

In addition to the above considerations, it is respectfully submitted that since the second portion of the oath in the *Knight* case survived challenge on vagueness grounds, it follows that the second portion of the Massachusetts oath does not violate due process. In *Knight*, the District Court upheld, and the Supreme Court affirmed without opinion, the statutory requirement of professional dedication. "In our view," the Court asserted, "a state can reasonably ask teachers in public or tax exempted institutions to subscribe to professional competence and dedication." *Knight, supra,* at 341. The Massachusetts oath does no more than require a dedication legitimately expected of a state employee. Just as a New York teacher was required to discharge, to the best of his ability, his duties as a teacher, a Massachusetts state employee is to discharge his duty to oppose the overthrow of the institution providing not only his salary but also his freedom.

It has been suggested that "to oppose the overthrow" imports an obligation to take a more active role in opposing the overthrow of the government than just maintaining a state of mind adverse to such overthrow, in particular by speaking out against such overthrow. Because the plaintiff argued below that such an interpretation was plausible,

and because the District Court seemed to accept such an interpretation as reasonable, the defendants responded below by arguing that even if the Court could read such into the word "oppose," such an oath would not infringe on Fourteenth Amendment rights to due process. This, too, would impose on the subscriber to the oath an obligation clearly asking of him the loyalty rightfully expected, a loyalty at least commensurate with one's status as an employee in the public service.

It should be noted, of course, that merely because an oath is susceptible to two reasonable interpretations does not compel invalidation. The vagueness test is much stricter, whether stated as whether the terms of an oath are "susceptible of objective measurement" or whether the terms are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." See *Cramp, supra*, and *Baggett, supra*. The English language is not so precise nor the skills of legislators so sharply honed, that ambiguity can be banished from the law. It is only when the ambiguity is so severe as to jeopardize seriously the ability of an ordinary reasonable man to conform his conduct to the dictates of the law that the law itself will be found to contravene the Constitution.

In addition to the above considerations, however, a review of the Supreme Court decisions in which loyalty oaths have been held invalid indicates that vagueness per se may be insufficient to invalidate an oath as unconstitutional. In particular, the Court has been reluctant to strike down loyalty oaths, no matter how ambiguous, absent a determination of impingement on First Amendment freedoms.

In considering attacks on loyalty oaths on vagueness grounds, the Court has adopted the technique of posing a series of specific, hypothetical examples of words or con-

duct which the oath may proscribe. See, for example, *Cramp* v. *Board of Public Instruction, supra,* at 286, in which the Court, in considering an oath which proscribed in broad terms the lending of any "'aid,' 'support,' 'advice,' 'counsel' or 'influence' to the Communist Party," posed the following questions:

> "Could one who had ever cast his vote for such a candidate [endorsed or supported by the Communist Party] safely subscribe to this legislative oath?
>
> "Could a lawyer who had ever represented the Communist Party or its members swear . . . that he had never knowingly lent his 'counsel' to the Party?
>
> "Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his 'support'?
>
> "Indeed, could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?"

It is significant that each hypothetical question so posed involves words or conduct clearly falling outside the area of the legitimate exercise of the state's police power. In *Cramp,* the Court tested the oath's vagueness by considering whether it reached acts or conduct within the umbrella of First Amendment rights. This approach blends into a consideration of an oath's overbreadth. The unifying factor in the Court's decisions appears to be an overriding concern that the oath may give rise to potential or actual violation of First Amendment freedoms. See 77 Yale L.J. 739 (1968), at 748-750.

Thus, the Court in *Cramp,* at page 286, found unconstitutional that portion of an oath requiring the subscriber

to swear that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" on the grounds that it was "lacking in . . . terms susceptible of objective measurement" and might give rise to violations of First Amendment freedoms of expression and association.

Similarly, in *Baggett* v. *Bullitt, supra,* the Court considered two oaths, one required of teachers, and the second of all state employees. The teachers' oath was as follows:

> "I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

The second oath required every state employee to swear that he was not a "subversive person," defined as follows:

> "any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes a member of a subversive organization or a foreign subversive organization." (The Act then de-

fines these organizations and declares the Communist Party to be a subversive organization and membership therein a subversive activity.)

The Court, citing *Cramp*, found the second *Baggett* oath to suffer from the same infirmities as the *Cramp* oath, in that the same questions could be asked as to the scope of its prohibitions. In addition, the oath raised troublesome uncertainties as to the role of scienter in the language prohibiting a person from advising another to commit an act which will incite yet a third person to overthrow or alter the constitutional government. Perhaps the most troublesome aspect of the oath was that it prohibited "alteration" by "revolution," and was not limited to overthrow by force or violence, thus abridging First Amendment freedoms of expression and association. The Court also invalidated the second oath required of all state employees for the reason that it might prohibit criticism of a state institution, criticism of the design of the flag or criticism of any past or present government policy.

Further, in *Elfbrandt* v. *Russell, supra*, at page 12, the Court invalidated an Arizona oath which provided as follows:

> "I . . . do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of [my] office . . . according to the best of my ability . . ."

A state employee was further subject to prosecution for a felony, perjury and dismissal from his employment if at

the time of taking the oath or thereafter he knowingly or willfully:

> "does commit or aid in the commission of any act to overthrow by force or violence the government of this state or any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or . . . becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona . . . and said officer or employee . . . had knowledge of said unlawful purpose of said organization . . ." (Page 13, footnote 2.)

The Court found the statute to be unconstitutional in that it proscribed membership without the specific intent to further the illegal aims of the organization, thus violating the freedom of association.

In *Keyishian* v. *Board of Regents, supra,* the Court, *inter alia,* found the requirement barring from employment anyone who deliberately teaches, advocates or advises the doctrine of forceful overthrow to be so broad in its application that it might be said to prohibit the mere advocacy of a doctrine without a specific intent to overthrow the government. At pages 599-560, the Court stated: "It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims." Once again, it appears that ambiguity alone, without additional First Amendment infirmities, is insufficient to invalidate an oath.

In contrast to the oaths in the foregoing cases, the Massachusetts oath does not place any limitation on an employ-

ee's speech or association. No words or conduct are proscribed: the subscriber is free to criticize the government and its policies and to join any organization he pleases. As such, the Massachusetts oath is quite unlike the so-called "negative" or "non-Communist" oaths seeking to limit the speech, actions and associations of the subscribers.

Furthermore, the oaths in the cases discussed above reached to situations where no clear and present danger of overthrow was present. In contrast, even if the Court deems the Massachusetts oath to require affirmative conduct in certain cases where the overthrow of the government is threatened, such a requirement, it is submitted, is limited to circumstances which present a clear and present danger to the very existence of the state. The Massachusetts oath cannot reasonably be read to require the subscriber to oppose an act which may merely tend to overthrow the government, or to oppose the teaching of the doctrine of overthrow, or to oppose an attempt to incite someone to participate in the overthrow of the government. The standard is more strict: at the very most, his responsibility does not arise unless and until there is a clear and present danger to the existence of the state.

It is respectfully submitted, then, that the District Court contravened both precedent and reason to the extent its judgment and injunction rested on a conclusion that Massachusetts General Laws, c. 264, § 14, violates the Fourteenth Amendment.

The District Court Erred in its Characterization of the Oath.

It is respectfully submitted that the District Court acted improperly in two further respects if the Massachusetts oath in question is susceptible of more than one interpretation.

The second portion of the Massachusetts oath requires that the subscriber swear or affirm:

> ". . . I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method."

The plaintiff proffered in her brief and oral argument below an interpretation of this portion of the oath which would place on the subscriber an affirmative responsibility to at least speak in opposition to the overthrow of the government when such overthrow is imminent. The plaintiff argued that, so interpreted, the oath contravened the plaintiff's constitutional freedom of speech. In answering this argument, the defendants below did not intend to adopt as their own the plaintiff's extreme interpretation of the second portion of the oath. Rather, the thrust of the defendants' counter-argument was that even if such an interpretation were accepted by the District Court as a reasonable characterization, the oath would be consistent with the Constitution.

The interpretation of the second portion of the oath embraced by the appellants as the most reasonable interpretation is basically as follows: the obligation assumed by the subscriber of the oath is limited to his not favoring the overthrow of the government by any of the enumerated means. This was the interpretation enunciated by at least one of the judges presiding at the hearing below.

In this regard, if there was some confusion below as to the official position of the Commonwealth as to the most reasonable interpretation of the second portion of the oath, the appellants contend that it was improper for the District Court not to abstain from deciding the case on the merits in order to give the Supreme Judicial Court of Massachu-

setts an opportunity to pass on the question of the oath's interpretation. *Harrison* v. *National Association for the Advancement of Colored People*, 360 U.S. 167; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496; *Burford* v. *Sun Oil Co.*, 319 U.S. 315. The Court in *Harrison* asserted, at page 176:

> ". . . no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."

The appellants contend that a federal judgment should be based on something that is a complete product of the Commonwealth, the loyalty oath as construed by the Supreme Judicial Court of Massachusetts. Such a definitive characterization of the oath might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem.

It is respectfully submitted that the District Court committed a further error to the extent the Massachusetts oath is susceptible of more than one interpretation. If the District Court considered the second portion of the oath in question susceptible of both a constitutional and unconstitutional interpretation, the District Court acted improperly in not accepting the interpretation consistent with the Constitution of the United States. See *Schneider* v. *Smith*, 390 U.S. 17, and *United States* v. *Rumely*, 345 U.S. 41.

In particular, the District Court indicates in its opinion of June 26, 1969, the plausibility of interpreting the second portion of the oath to mean the subscriber will "not favor" the overthrow of the government (Appendix, page 29). This is the interpretation advanced by the appellants. The District Court states that, had the statute plainly been

so written, "we might find it difficult to support the plaintiff's contention that the First Amendment forbade the state from imposing such restrictions on its employees." (Appendix, page 29). The Court then discusses what in the oath's language might lead the Court to such a saving interpretation. The District Court erred in not accepting such an interpretation rendering the Massachusetts oath consistent with the Constitution of the United States.

Moreover, if the District Court found that two interpretations could be derived from the language of the oath and did not commit error by failing to adopt the interpretation consistent with federal constitutional provisions, it is important to note that the two interpretations are not so different from one another as to render the oath impermissibly vague. The affirmative action flowing from one interpretation requires no more of the average state employee than a refusal to cooperate with or to participate in activities which violently or illegally or forcefully or unconstitutionally bring about the overthrow of the government. This requirement, the appellants contend, is perfectly consistent with the understanding of the oath, urged by the appellants, which necessitates a state employee not favoring the overthrow of the government by these methods.

Lastly, it is respectfully submitted that if the second portion of the Massachusetts oath is, indeed, unconstitutional while the first portion is entirely valid, the District Court erred in not so declaring in its judgment and injunction. By holding the entire statutory provision unconstitutional, rather than expressly severing the constitutional portion of the oath from the unconstitutional, the District Court has unnecessarily struck down what is clearly not unconstitutional. Furthermore, by failing to expressly sever the Massachusetts oath, the District Court leaves the Commonwealth of Massachusetts in limbo as to the status of a measure vital to protecting the public service.

Conclusion.

For the reasons stated above, it is respectfully submitted that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment and injunction in question, and should exercise such jurisdiction in this case.

ROBERT H. QUINN,
Attorney General,
MARK L. COHEN,
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GREGOR I. McGREGOR,
Deputy Assistant Attorney General.

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

No. 69-302-G

LUCRETIA PETEROS RICHARDSON, *Plaintiff*,

v.

DR. JONATHAN O. COLE, Superintendent, Boston States Hospital, AND DR. MILTON GREENBLATT, Commissioner, Department of Mental Health, Commonwealth of Massachusetts, *Defendants*.

Before ALDRICH, *Circuit Judge*,
JULIAN and GARRITY, *District Judges*.

Opinion.

June 26, 1969

ALDRICH, *Circuit Judge*. The plaintiff, after six weeks of employment by the Commonwealth of Massachusetts as a research sociologist at the Boston State Hospital, was informed that she would have to take the oath required of all public employees by Mass. G. L. c. 264 § 14. Upon her refusal, on the assertion that the oath was unconstitutional, she was paid for her services to date and told that no further compensation could be made. She then brought the present suit under 28 U.S.C. § 2281, requesting the appointment of a three-judge district court and a declaration of

the statute's unconstitutionality. Named respondents are the Superintendent of the hospital and the Commissioner of the Department of Mental Health, but the Commonwealth was properly served and defends through the Attorney General, and for convenience we will refer to the Commonwealth as the respondent. No question of standing is raised.

The statutorily required oath is as follows.

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."

A "violation" of section 14, which presumably means a failure to "live up" to the oath, since its phraseology is in the future tense, is a felony. Mass. G.L. c. 264 § 15.

The oath can be conveniently divided into two parts, the first ending with the word "Massachusetts." Plaintiff makes an esoteric analysis of the phrase "uphold and defend" from which she argues that even this part is improper. We consider this argument foreclosed by *Knight* v. *Board of Regents*, S.D.N.Y., 1967, 269 F. Supp. 339, *aff'd* 390 U.S. 36. While the obligation in *Knight* was to "support" the constitution, traditionally the words "support," "uphold," and "defend" may be regarded as equivalents. *See*, Report of the Attorney General (of Mass.) (1967) pp. 206-07.

Plaintiff takes an equally esoteric word-by-word approach to the second part which, if we were to follow it, would make almost any sentence in the English language ambiguous. A criminal statute is to be strictly interpreted, but this does

not mean that common sense is to be jettisoned. In at least one aspect, however, we must agree with plaintiff's position. We find the phrase "oppose the overthrow" fatally vague and unspecific.

The word "oppose" has a number of common meanings, running from the negative, "not favor," or "refrain from," to the affirmative, viz., to take active steps to restrain the conduct of others. Had the statute plainly said the former, we might find it difficult to support the plaintiff's contention that the First Amendment forbade the state from imposing such restrictions upon its employees. This would involve the question whether what, for the ordinary citizen, may be free speech if the approval of violence is sufficiently benign, *cf. Brandenberg* v. *Ohio*, U.S. (6/10/69) 37 L.W. 4525, may be forbidden to public employees. *Cf. Garner* v. *Board of Public Works of Los Angeles*, 1951, 341 U.S. 116. We might be particularly led to such a restricted meaning of "oppose" by the fact that the statute reads "overthrow" as distinguished from "attempt to overthrow." Obviously if one is speaking in terms of making active opposition to someone else's conduct, it is too late to oppose after there has been an overthrow—the opposition must be to the attempt. On the other hand, if one is speaking of one's personal standards one can favor an overthrow, or not favor it.

However, there is another possible, and in the opinion of at least one member of this court, even more plausible interpretation of the oath. This meaning has, in fact, been embraced by the Commonwealth. In its brief it says,

> "[I]n the event that a clear and present danger arose of the actual overthrow of the government, . . . the public employee [would] be required to use reasonable means at his disposal to attempt to thwart that effort. What he might do in such circumstances could range

> from the use of physical force to speaking out against the downfall of the government. The kind of response required would be commensurate with the circumstances and with the employee's ability, his training, and the means available to him at the time."

In oral argument the Deputy Assistant Attorney General amplified the Commonwealth's position. There were, he asserted, three standards of obligation to take active steps to "oppose" the overthrow of the government by force or violence. The ordinary citizen who has taken no oath has an obligation to act *in extremis;* a person who has taken the first part of the present oath would have a somewhat larger obligation, and one who has taken the second part has one still larger.

We need not explore these undefined boundaries. The very fact that such varied standards, as well as the alternative one of purely negative behavior earlier adverted to, can be suggested is enough to condemn the language as hopelessly vague. It is, of course, well settled that employment cannot be conditioned upon an unintelligible oath. *Cf: Connally* v. *General Constr. Co.*, 1926, 269 U.S. 385, 391; *Cramp* v. *Board of Instruction of Orange County*, 1961, 368 U.S. 278, 287.

Plaintiff is entitled to a declaration that the statute is unconstitutional. She is also entitled to the injunction requested, forbidding the defendants from prohibiting her from discharging her duties at the Boston State Hospital insofar as such prohibition is based upon her refusal to take the oath required by Mass. G.L. c. 264(14). We cannot grant her request for back pay.

BAILEY ALDRICH
ANTHONY JULIAN
W. ARTHUR GARRITY JR.
E.D.

Judgment and Injunction.

June 26, 1969

This cause came on to be heard upon the complaint of Lucretia Peteros Richardson. The Court, upon consideration of the complaint, the answer of the defendants, the stipulation of facts, the briefs and arguments of counsel for the plaintiffs and the defendants, and for the reasons stated in its opinion filed herewith,

ORDERS, ADJUDGES and DECREES:

a) that section 14 of chapter 264 of the General Laws of Massachusetts violates the First Amendment of the Constitution of the United States and is therefore invalid; and

b) that the defendants be, and they are hereby, permanently enjoined from prohibiting the plaintiff from discharging her duties at the Boston State Hospital insofar as such prohibition is based upon her refusal to take the oath required by said section 14 of chapter 264 of the General Laws of Massachusetts.

BAILEY ALDRICH
ANTHONY JULIAN
W. ARTHUR GARRITY, JR.

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In the
Supreme Court of the United States

October Term, 1969

No. 774

LUCRETIA PETEROS RICHARDSON,
APPELLANT,

v.

DR. JONATHAN O. COLE, Superintendent,
Boston State Hospital

and

DR. MILTON GREENBLATT, Commissioner,
Department of Mental Health,
Commonwealth of Massachusetts,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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In the
Supreme Court of the United States

October Term, 1969

No.

LUCRETIA PETEROS RICHARDSON,
APPELLANT,

v.

DR. JONATHAN O. COLE, Superintendent,
Department of Mental Health,
Boston State Hospital

and

DR. MILTON GREENBLATT, Commissioner,
Commonwealth of Massachusetts,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Jurisdictional Statement

Appellant Lucretia Peteros Richardson submits this jurisdictional statement pursuant to Rule 15. Reference will be made from time to time to the jurisdictional statement filed on September 29, 1969 by the Attorney Gen-

eral of Massachusetts on behalf of Dr. Jonathan O. Cole, et al., appellants in that case, No. 679, and appellees in this cross-appeal.

Opinion Below

At the time of the preparation of this statement the opinion of the United States District Court for the District of Massachusetts is unreported. Copies of that opinion and of the court's judgment and injunction, both entered on June 26, 1969, are annexed in the appendix to the jurisdictional statement in case No. 679, at pages 27-31.

Jurisdiction

This is an appeal from the judgment and injunction of a three-judge district court convened pursuant to 28 U.S.C. §§ 2281 and 2284. In the court below the plaintiff-appellant, Lucretia Peteros Richardson, sought an injunction and damages under 28 U.S.C. §§ 1331 and 1343 (3) and 42 U.S.C. § 1983, claiming that she had been denied continued employment at Boston State Hospital, a state institution of the Commonwealth of Massachusetts, because of her refusal to take and subscribe to a loyalty oath required of all state employees by a Massachusetts statute.

On June 26, 1969 the court entered its judgment and injunction and filed concurrently therewith its opinion, declaring the statute in question to be in violation of the Constitution of the United States and enjoining the defendant from prohibiting the plaintiff from discharging her duties at the state institution insofar as such prohibition might be based on her refusal to take the invalid oath. However, the court did not grant the appellant's request for damages for her uncompensated employment, stating simply in the last line of its opinion that "We cannot grant her request for back pay."

Appellant filed a notice of appeal in the United States District Court for the District of Massachusetts on August 25, 1969. (On July 30, 1969 appellees in this appeal filed a notice of appeal in the same court, case No. 679.)

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §§ 1253 and 2101(b).

The validity of a state statute is not involved in this appeal. (In the appeal by the defendants, No. 679, the state statute prescribing the loyalty oath declared unconstitutional by the three-judge court is set forth at pages 2-3 of their jurisdictional statement.)

Question Presented

Did the three-judge court err in refusing to grant appellant's claim for back pay?

Statement of the Case

The defendant-appellee, Dr. Jonathan O. Cole, is Superintendent of Boston State Hospital, a state institution. The defendant-appellee, Dr. Milton Greenblatt, is Commissioner of Mental Health for the Commonwealth of Massachusetts. Plaintiff-appellant Lucretia Peteros Richardson was employed as a research sociologist at Boston State Hospital commencing work on September 30, 1968. On November 15, 1968 during her employment processing Mrs. Richardson was advised by the personnel department of Boston State Hospital that her employment could not be continued until and unless she signed an oath as required by Massachusetts General Laws, c. 264 § 14, as follows:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of

America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the Government of the United States of America or of this Commonwealth, by force, violence or by any illegal or unconstitutional method."

Mrs. Richardson refused to take the oath.

On November 25, 1968 Mrs. Richardson again refused to take the oath. Her employment at Boston State Hospital was thereupon terminated. She was paid for her services from September 30, 1968 through November 25, 1968. Thereafter Mrs. Richardson continued to work from time to time on the research project at the state institution, for which work she was not compensated.

By complaint filed March 21, 1969 Mrs. Richardson brought an action in the United States District Court for the District of Massachusetts alleging the unconstitutionality of the statue, G.L. c. 264 § 14, and praying for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, an injunction against her being prohibited from continuing her employment, for damages for her uncompensated employment and for such other relief as to the court might seem just.

On May 16, 1969 counsel for both sides submitted a stipulation as required by the pre-trial order of the district court of May 7, 1969. The paragraphs of that stipulation relevant to this appeal are as follows:

"8. Plaintiff volunteered to work full-time at Boston State Hospital from November 25, 1968 to December 20, 1968; without pay, in order to continue her research project. Plaintiff was subsequently paid for her services from September 30, 1968 to November 25, 1968. From January 27, 1969 to the present date, Plaintiff has worked at approximately one-third full time at Boston State Hospital on her research project.

"9. Plaintiff is ready, willing and able to recommence her employment at Boston State Hospital but her refusal to take the oath required by M.G.L. c. 264 § 14, represents an absolute bar to such employment. The project for which Plaintiff was hired is still ongoing at Boston State Hospital."

On June 26, 1969 the district court upon consideration of the complaint, the answer of the defendants, the stipulation of facts, and the briefs and arguments of counsel, held unconstitutional and enjoined the operation of Massachusetts General Laws c. 264 § 14. In its judgment and injunction of June 26, 1969, the district court ordered, adjudged and decreed:

"(a) that section 14 of chapter 264 of the General Laws of Massachusetts violates the First Amendment of the Constitution of the United States and is therefore invalid; and

"(b) that the defendants be, and they are hereby, permanently enjoined from prohibiting the plaintiff from discharging her duties at the Boston State Hospital insofar as such prohibition is based upon her refusal to take the oath required by said section 14 of chapter 264 of the General Laws of Massachusetts."

The judgment, however, made no mention of the appellant's claim for damages, the court stating simply at the end of its opinion that it could not grant the plaintiff's request for back pay.

Appellant Richardson filed notice of appeal in the United States District Court for the District of Massachusetts on August 25, 1969.

The Question Presented is Substantial.

The question presented by this appeal is substantial, involving whether a federal court has done and can do

full justice in vindicating constitutional rights by declaring a statute void and enjoining its operation, yet refusing without any assignment of grounds, to give the relief in money damages which should by right be a consequence of that declaration and injunction.

Initially the question of whether the appellant is entitled to damages is a question of substantive state law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Under Massachusetts law there is no question that appellant is entitled to damages. The basic rule for recovery on an employment contract by a state employee wrongfully discharged is that he is entitled to the balance of the contract price. *McKenna v. Commissioner of Mental Health*, 347 Mass. 674, 199 N.E. 2d (1964).

In the instant case it was stipulated that the appellant was "ready, willing and able to recommence her employment" (Stipulation, ¶ 9). The plaintiff should therefore be given the full damages accruing to her by virtue of her wrongful discharge from a job which was conceded to be "still on-going" on the date of the filing of the stipulation (Stipulation, ¶ 9).

It was well within the competence of the federal court in Massachusetts to give appellant the relief she is asking for. In *Thompson v. Shapiro*, U.S. , 22 L.Ed. 600 (1969) this Court affirmed three-judge federal courts in three different districts (and approved decisions by federal courts in four other districts) declaring the residency requirements in state welfare statutes unconstitutional and ordering that AFDC claimants not be refused payment by virtue of those requirements. In the Connecticut case the majority dealt briefly with an objection to the relief given on the basis of sovereign immunity. Concluding that "this Court can order Commissioner Shapiro to tender [state] monies which he unconstitutionally withheld . . ." the court cited *Department of Employment v. United*

States, 385 U.S. 355 (1966), and other cases to the effect that a state official derives no immune status from his official position when acting in an unconstitutional manner. *Thompson* v. *Shapiro*, 270 F.Supp. 331, 338 n.5 (D. Conn. 1967).

The state courts of Massachusetts similarly will not refuse to order a public official to dispense public funds to a present or former state employee when those funds would have been dispensed in the normal course if the law had been adhered to. *McKenna* v. *Commissioner of Mental Health*, 347 Mass. 674, 199 N.E. 2d 686 (1964).

Finally, the district court should have no difficulty in fashioning a decree for back pay from December 20, 1968. See, *e.g.*, order for decree in *Thompson* v. *Shapiro*, *supra*, 270 F.Supp., at 338.

For the reasons above stated, appellant submits that the court below erred in declaring the discharge of the appellant to be invalid and wrongful under the Constitution and then in denying her the damages naturally and necessarily resulting from that wrongful discharge. This Court has jurisdiction on direct appeal to review the action of the three-judge court, and it should exercise that jurisdiction to insure that full justice is done.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 679

DR. JONATHAN O. COLE, Superintendent,
Boston State Hospital

AND

DR. MILTON GREENBLATT, Commissioner,
Department of Mental Health
Commonwealth of Massachusetts,

APPELLANTS,

v.

LUCRETIA PETEROS RICHARDSON,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM OR DISMISS

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 679

DR. JONATHAN O. COLE, Superintendent,
Boston State Hospital

AND

DR. MILTON GREENBLATT, Commissioner,
Department of Mental Health
Commonwealth of Massachusetts,

APPELLANTS,

v.

LUCRETIA PETEROS RICHARDSON,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM OR DISMISS

The appellee, Lucretia Peteros Richardson, pursuant to Rule 16 of the Rules of this court, hereby moves to affirm the decision of the court below on the ground that that decision is fully supported by prior decisions of this Court. In support of her motion, the appellee cites the following decisions: *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Cramp*

v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Whitehill* v. *Elkins*, 389 U.S. 54 (1967).

In the alternative, the appellee moves to dismiss the appeal on the ground of mootness in view of the following facts:

> At the time this case was heard and argued in the district court the appellee's job at Boston State Hospital was still in existence, but at or before the time the appellants filed their present appeal such job had been discontinued.

For the reasons stated above, appellee respectfully moves that this Court affirm the decision of the court below or dismiss the appeal in this case.

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SUPREME COURT, U. S.

NOV [illegible] 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 774.

LUCRETIA PETEROS RICHARDSON,
Appellant,
v.
DR. JONATHAN O. COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL,
AND
DR. MILTON GREENBLATT, COMMISSIONER, DEPARTMENT OF MENTAL HEALTH, COMMONWEALTH OF MASSACHUSETTS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM.

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In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 774.

LUCRETIA PETEROS RICHARDSON,
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v.
DR. JONATHAN O. COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL,
AND
DR. MILTON GREENBLATT, COMMISSIONER, DEPARTMENT OF MENTAL HEALTH, COMMONWEALTH OF MASSACHUSETTS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM.

The appellees, Dr. Jonathan O. Cole and Dr. Milton Greenblatt, pursuant to Rule 16 of the Rules of this Court, hereby move to affirm so much of the decision of the court below as was appealed in case No. 774. (Appellees in this cross-appeal are appellants in case No. 679.) This motion is made on the ground that the questions on which the decision of the cause depends are so insubstantial as to require no further argument, and on the further ground that the decision below is fully supported by case law.

As appellant concedes in her jurisdictional statement, at page 6, the question of the appellant's damages is a question of substantive state law. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). In Massachusetts, the extent of a plaintiff's injury and the sum required to fairly compensate him are questions of fact, resting in the discretion of the trial court. *Kinnear* v. *General Mills, Inc.*, 308 Mass. 344, 349, 32 N.E. 2d 263 (1941). Only in rare instances is the award to be disturbed. An appellate tribunal must allow a decision on the issue of damages to stand unless the court's refusal, or alternatively the court's grant of damages, was an abuse of discretion amounting to an error of law. An abuse of discretion consists of judicial action that no conscientious judge, acting intelligently, could honestly have taken. Only when an imperative legal duty supersedes the discretion of the court will an award or refusal of damages be overturned. *Bartley* v. *Phillips*, 317 Mass. 35, at 43, 44, 57 N.E. 2d 26 (1944), and cases cited therein, followed, *e.g.*, in *Growers Outlet, Inc.* v. *Henry E. Stone*, 333 Mass. 437, 131 N.E. 2d 210 (1956), and *Babish* v. *Cambridge*, 337 Mass. 274, 149 N.E. 2d 229 (1958). See also *King Features Syndicate, Inc.* v. *Cape Cod Broadcasting Co. Inc.*, 318 Mass. 783, 64 N.E. 2d 925 (1945).

It is respectfully submitted that, in the case at bar, examination of the evidence before the three-judge court on the issues of damages does not disclose that the court abused its discretion.[1]

---

[1] If the court determines that the standard of reviewability of the three-judge court's award of damages is not a matter of substantive state law, and that some other standard applies, such as that enunciated by the Second Circuit Court of Appeals in *Dagnello* v. *Long Island Rail Road Co.*, 289 F. 2d 797 (1961), and that such standard is different from that employed by Massachusetts courts, it is respectfully submitted that examination of the evidence before the three-judge court on the issue of damages would not disclose that the court's decision was wrong.

As discussed above, a factual analysis is sufficient to disclose no basis for an award of back pay. An independent ground for an affirmance of this aspect of the decision below is premised on the issue of retroactivity.

It is submitted that, for good reason, the three-judge court limited its injunction to future refusals of employment based on a failure to subscribe to the loyalty oath. The court manifested no intent that past denials of public employment now give rise to judicial relief.

Conclusion.

For the reasons stated above, appellees respectfully move that this Court affirm the decision of the court below on the precise issue raised in this cross-appeal.

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No. 679

In The Supreme Court of The United States

OCTOBER TERM, 1969.

DR. JONATHAN Q. COLE,
Superintendent, Boston State Hospital
AND
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Appellants

v.

LUCRETIA PETEROS RICHARDSON,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS

ROBERT H. QUINN,
Attorney General
MARK L. COHEN,
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In The Supreme Court of The United States

OCTOBER TERM, 1969.

No. 679

DR. JONATHAN O. COLE,
Superintendent, Boston State Hospital
AND
DR. MILTON GREENBLATT, *Commissioner,*
Department of Mental Health,
Commonwealth of Massachusetts
Appellants

v.

LUCRETIA PETEROS RICHARDSON,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS

The appellee has moved this Court to dismiss the appeal on the grounds of mootness. As shown in the affidavit attached, appellants submit that this case is not moot. The affidavit of Doctor Cole states that at all times since the decision of the District Court it has been open to the appellee to apply for employment at the Boston State Hospital and that employment "consonant with her abilities and qualifications" has been available, if the appellee desired to apply for such employment, and, finally, the

specific project for which the appellee was employed still exists. For these reasons, we submit that the motion to dismiss and/or affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted,

ROBERT H. QUINN,
Attorney General

MARK L. COHEN,
Assistant Attorney General

WALTER H. MAYO III,
Assistant Attorney General

GREGOR I. MCGREGOR,
Deputy Assistant Attorney General

Certificate of Service

I, Walter H. Mayo III, a member of the bar of the Supreme Court of the United States, hereby certify that I have served a copy of the Memorandum in Opposition to the Motion to Dismiss on the appellee by mailing same today, via first class mail, postage prepaid, to Ernest Winsor, Esquire, Hale & Dorr, 28 State Street, Boston, Mass.

WALTER H. MAYO III

Dated: February 6, 1970

C11. 10M-9-69-045333

The Commonwealth of Massachusetts

JOHN F. X. DAVOREN
Secretary of the Commonwealth

D 827

Boston, February 6, 1970

I HEREBY CERTIFY, *That at the date of the attestation hereto annexed*

CHARLES K. MONE

whose name is signed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking such acknowledgment, proof or affidavit, a NOTARY PUBLIC for the said Commonwealth duly commissioned and sworn; that to his acts and attestations as such, full faith and credit are and ought to be given in and out of court; that as such Notary Public he was by law authorized to take the same, to take depositions, to administer oaths and take acknowledgments of deeds or conveyances of lands, tenements or hereditaments and other instruments throughout the Commonwealth to be recorded according to law; that I have compared his signature to the annexed attestation with the original on file in this office, and verily believe it to be genuine. I further certify that the impressions of the seals of Notaries Public are not required by law to be filed in this office.

IN TESTIMONY OF WHICH, *I have hereunto affixed the*
GREAT SEAL OF THE COMMONWEALTH
the date above written.
JOHN F. X. DAVOREN
Secretary of the Commonwealth

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1969

No. 679

DR. JONATHAN O. COLE, *Superintendent*, Boston State Hospital, and DR. MILTON GREENBLATT, *Commissioner*, Department of Mental Health, Commonwealth of Massachusetts,

Appellants,

v.

LUCRETIA PETEROS RICHARDSON,

Appellee.

AFFIDAVIT.

Dr. Jonathan O. Cole, being duly sworn, deposes and says:

1. At all times subsequent to the decision of the United States District Court in the above-entitled case on June 26, 1969 it has been, and at the present time is, open for the appellee Lucretia Peteros Richardson to apply for employment at Boston State Hospital and enjoy full consideration pursuant to the terms of the decision of the District Court;

2. Employment consonant with her abilities and qualifications has been and is periodically available should she wish to apply for such employment;

3. The project for which the appellee was hired is still on-going at Boston State Hospital.

DR. JONATHAN O. COLE

Subscribed and sworn to before me
this 6th day of February, 1970.

CHARLES K. MONE
Notary Public

My commission expires: April 2, 1976

SUPREME COURT OF THE UNITED STATES

October Term, 1969

COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL, ET AL. *v.* RICHARDSON; and

RICHARDSON *v.* COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Nos. 679 and 774. Decided March 16, 1970

PER CURIAM.

The judgment is vacated and the cases are remanded to the United States District Court for the District of Massachusetts to determine whether these cases have become moot.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE joins, concurring in the result.

The present appeals are from a single action commenced in the Massachusetts District Court by Mrs. Richardson, challenging the validity of Mass. Gen. L., c. 264, § 14. That law requires all public employees to subscribe to a loyalty oath which reads as follows:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the Government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."

Mrs. Richardson sought declaratory and injunctive relief against enforcement of the oath as a bar to her resuming employment with Boston State Hospital, and also sought

damages for pay withheld by reason of her having refused to subscribe to the oath.

The District Court granted the requested declaratory and injunctive relief, but stated in its opinion, "We cannot grant her [Mrs. Richardson's] request for back pay." * Accordingly, the formal judgment contained no allusion to the back pay request.

The State in No. 679 appeals from the award of declaratory and injunctive relief. Mrs. Richardson has cross-appealed from the denial of back pay and by way of response to the State's appeal moved for summary affirmance and suggested, in the alternative, that the State's appeal is moot since the particular job she held has been "discontinued." In reply, Dr. Cole, the hospital superintendent, has submitted an affidavit asserting that "employment consonant with [Mrs. Richardson's] abilities and qualifications has been and is periodically available should she wish to apply for such employment."

I fail to understand today's wholly unexplained and extraordinary disposition of remanding to the lower court to determine if this case is moot. Since the State has not disputed Mrs. Richardson's specific statement that the job *she held* is no longer in existence, there may be some question as to whether a controversy continues to exist in No. 679, although I would have thought this question one to be resolved by this Court, without the necessity of a remand. Certainly, however, there can be no question that a live controversy exists over the damage question.

I am, however, content to acquiesce in the Court's action because of the manifest triviality of the impact of the oath under challenge, a factor which may, I suspect, underlie today's unusual disposition.

*It appears from Mrs. Richardson's jurisdictional statement in No. 774 that she stipulated in the District Court that after her formal termination of employment on November 25, 1968, for refusing to take the oath, she "volunteered to work full time at Boston State Hospital . . . to continue her research project."

Whether or not one considers that the District Court erred in what perforce amounts to an exercise in semantics, I would suppose that the vagueness contentions in this instance can, depending on how one defines his terms, be characterized as at least colorable—for as the opinion below aptly points out, almost any word or phrase may be rendered vague and ambiguous by dissection with a sematic scalpel. I do not, however, consider it a provident use of the time of this Court to coach what amounts to little more than verbal calisthenics. Cf. Chase, The Tyranny of Words (1959); Empson, Seven Types of Ambiguity (1955). This kind of semantic inquiry, however interesting, should not occupy the time of federal courts unless fundamental rights turn on the outcome.

I think it can be fairly said that subscribing to the instant oath subjected appellant to no more than an amenity. No First Amendment considerations, are, in my view, at all involved in this case. This oath does not impinge on conscience or belief, except to the extent that oath-taking as such may offend particular individuals. I also think it safe to say that the signing of this oath triggered no serious possibility of prosecution for either perjury or failure to perform the obligations of the oath. Indeed, I consider it most unfortunate that our past decisions in this field can be construed even to require solemn convocation of three federal judges to deal with a matter of such practical inconsequence.

MR. JUSTICE DOUGLAS, dissenting.

The plaintiff Richardson brought this action before a three-judge District Court to declare unconstitutional a Massachusetts loyalty oath statute, to enjoin her superiors at the Boston State Hospital from prohibiting her from discharging her duties at the Hospital, and to recover back pay. The District Court entered its opinion granting the declaratory and injunctive relief but denying the claim for back pay on June 26, 1969. 300 F.

Supp. 1321. Appellants in No. 679 filed a notice of appeal from the grant of injunctive and declaratory relief in the District Court on July 30, 1969, and docketed a timely appeal in this Court on September 29, 1969. Notice of appeal from the denial of back pay was filed in No. 774 in the District Court on August 25, 1969, and a timely appeal was docketed in this Court on October 24, 1969.

On October 25, 1969, appellee in No. 679 filed a motion to affirm or dismiss on the grounds of mootness: "At the time this case was heard and argued in the district court the appellee's job at Boston State Hospital was still in existence, but at or before the time the appellants filed their present appeal such job had been discontinued."

In reply, appellants in No. 679 deny that the case is moot and in support thereof submit an affidavit of Dr. Cole, Superintendent of the Boston State Hospital, which states:

> "1. At all times subsequent to the decision of the United States District Court in the above-entitled case on June 26, 1969, it has been, and at the present time is, open for the appellee Lucretia Peteros Richardson to apply for employment at Boston State Hospital and enjoy full consideration pursuant to the terms of the decision of the District Court;
>
> "2. Employment consonant with her abilities and qualifications has been and is periodically available should she wish to apply for such employment;
>
> "3. The project for which the appellee was hired is still on-going at Boston State Hospital."

I do not see how one can even arguably maintain that the case is moot.

The question tendered is an important one. The state oath struck down by the District Court on the grounds of vagueness reads as follows:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States

of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." Mass. Gen. Laws, c. 264, § 14 (1959).

The District Court said:

> "A 'violation' of section 14, which presumably means a failure to 'live up' to the oath, since its phraseology is in the future tense, is a felony." 300 F. Supp., at 1322.

The unanimous opinion of the District Court holding the oath unconstitutional is earnestly challenged by Massachusetts, which maintains that the invalidation of the oath is an unwarranted federal invasion of the State's domain.

I would note probable jurisdiction on both appeals and put the cases down for oral argument.